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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA**

MICHAEL SCOTT BRUMBACK,
an individual, et al.,

Plaintiffs,

v.

ROBERT W. FERGUSON, in his
official capacity as Washington
State Attorney General, et al.,

Defendants,

ALLIANCE FOR GUN
RESPONSIBILITY,

Intervenor-Defendant.

NO. 1:22-cv-03093-MKD

REPLY IN SUPPORT OF
STATE DEFENDANTS'
AND INTERVENOR-
DEFENDANT'S MOTION
TO STRIKE PLAINTIFFS'
NOTICE OF
SUPPLEMENTAL
AUTHORITY

January 23, 2023
Without Oral Argument

I. INTRODUCTION

Plaintiffs' response brief confirms that the documents Defendants have moved to strike are evidence, not legal authority. Regardless of its relevance or

1 irrelevance, the manner in which this evidence was submitted is highly
 2 prejudicial to Defendants, leaving them with no procedurally appropriate way to
 3 submit responsive evidence or argument. Plaintiffs’ own cited authority confirms
 4 that such belated evidentiary submissions “unfairly prejudice” other parties,
 5 “potentially open a floodgate for impertinent and untimely filings[,]” and should
 6 be stricken. *Blough v. Shea Homes, Inc.*, No. 2:12-cv-01493-RSM, 2014 WL
 7 3694231, at *18 (W.D. Wash. Jul. 23, 2014) (granting motion to strike
 8 supplemental exhibit). Accordingly, ECF Nos. 41-1, 41-2, 41-3, 41-4, 41-5, 41-
 9 6, 41-8, 41-9, 41-10, 41-11, and 41-12 should be stricken from the record.

10 Plaintiffs ask the Court to “retain in the very least” ECF Nos. 41-1, 41-2,
 11 41-3, 41-5, 41-6, and 41-7, and only make arguments against striking these six
 12 documents. ECF No. 44 at 2–4. Defendants did not move to strike ECF No. 41-
 13 7 (an Oregon state court decision), which leaves only five contested documents.
 14 Striking each of these documents is warranted for the reasons discussed below.

15 II. ARGUMENT

16 Plaintiffs concede that the contested documents are “not binding court
 17 decisions” submitted to alert the Court to new legal developments—rather, they
 18 are “expert testimonies” and other evidence. ECF No. 44 (Resp.) at 2–3, 5–7.
 19 Plaintiffs argue that this evidence is relevant to their pending Motion for
 20 Preliminary Injunction (ECF No. 20) because it is “related to current and
 21 historical use of” large-capacity magazines and because it “demonstrates that the
 22

1 State is enforcing the provisions of RCW 9.41 challenged in this lawsuit[.]” *Id.*
 2 at 2–3. But the evidence’s relevance or irrelevance¹ is beside the point.
 3 Defendants’ objection is a procedural one: submitting new evidence *after* the
 4 close of briefing and argument is procedurally improper and fundamentally unfair
 5 because it leaves Defendants with no meaningful opportunity to respond with
 6 rebuttal expert testimony, other evidence, or argument. *See* ECF No. 42 at 6–7.

7 Plaintiffs cite no rule or legal authority that permits such evidentiary
 8 supplementation of the record by ambush. Nor do they attempt to explain how
 9 their belated submission of new evidence comports with the procedural rules
 10 governing motions practice in this district—it plainly does not. *See* ECF No. 42
 11 at 6. Indeed, *Plaintiffs’ own authority* confirms that “[a]llowing [a party] to
 12 unilaterally disregard the local rules and to supplement the record without prior
 13 leave of the Court would unfairly prejudice [other parties] and potentially open a
 14 floodgate for impertinent and untimely filings.” *Blough*, 2014 WL 3694231, at
 15 *18 (striking untimely submitted evidence); *see* ECF No. 44 at 6.

16 Accordingly, as Plaintiffs’ cited authority confirms, courts permit
 17 supplementation of the record only upon a proper motion to supplement and
 18 _____

19 ¹ Plaintiffs offer no explanation for why the State’s enforcement action is
 20 relevant to the pending Motion for Preliminary Injunction. *Compare* ECF No. 44
 21 *with* ECF No. 42 at 5–6 (explaining that this evidence is “straightforwardly
 22 irrelevant”). Regardless, the existence of the enforcement lawsuit is undisputed.

1 where the supplementation will not prejudice the other parties. *See Continental*
 2 *Cas. Co. v. Duyzend*, No. 2:13-cv-01508-MJP, 2014 WL 468014, at *2 (W.D.
 3 Wash. Feb. 5, 2014) (granting plaintiff’s motion to supplement record with
 4 emails related to timing of defendant’s answer, where plaintiff concurrently (but
 5 unsuccessfully) moved to strike answer as untimely); *Tilden-Coil Constructors,*
 6 *Inc. v. Landmark Am. Ins. Co.*, No. 2:09-cv-01574-JLR, 2011 WL 780876, at *1
 7 (W.D. Wash. Feb. 25, 2011) (granting plaintiff’s motion to supplement record
 8 with contractual provisions substantiating claim for attorney’s fee award, where
 9 defendant “had notice of [plaintiff’s] argument and access to the Contract
 10 Documents in question and is therefore not prejudiced . . .”). Here, in contrast to
 11 the cases on which they rely, Plaintiffs have submitted supplemental expert
 12 testimony and other evidence *without* prior notice to Defendants or leave of the
 13 Court, and with no meaningful opportunity for Defendants to respond.

14 III. CONCLUSION

15 To prevent undue prejudice to Defendants, the Court should strike
 16 Plaintiffs’ procedurally improper and belatedly submitted evidence (ECF Nos.
 17 41-1, 41-2, 41-3, 41-4, 41-5, 41-6, 41-8, 41-9, 41-10, 41-11, and 41-12).
 18 Alternatively, if the Court is inclined to admit this evidence into the record,
 19 Defendants respectfully request an opportunity to respond with rebuttal evidence
 20 and argument.
 21
 22

1 DATED this 29th day of December 2022.

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3 Attorney General

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PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 29th day of December 2022 at Seattle, Washington.

s/ Brian H. Rowe

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Assistant Attorney General